Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 2002

D&J ENTERPRISES, Inc.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals should have applied *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (conviction automatically reversed where trial court fails to inquire into defense counsel's objection to his representation of co-defendants based on conflict of interest) rather than *Mickens v. Taylor*, 122 S.Ct. 1237 (2002) (no automatic reversal under *Holloway* where conflict of interest issue not raised until after trial in which case petitioner's burden is to show that alleged conflict adversely affected counsel's representation) where the prosecutor filed a sealed pretrial objection to the representation of the defendant by defense counsel based upon the conflict of interest arising from the prosecutor's investigation into counsel's alleged criminal activities and the trial court failed to conduct an inquiry or otherwise disclose the conflict to the petitioner.

2. Whether the Court should grant review to resolve the circuit conflict as to whether an evidentiary hearing is required where a defendant alleges that his trial counsel's performance was adversely affected by a conflict of interest which arose from a criminal investigation of trial counsel by the same United States Attorney's Office that was prosecuting the defendant at the time of the prosecution.

3. Should the petitioner be awarded a new trial pursuant to the reasoning of *Campbell v. Rice*, 302 F.3d 892 (9th Cir.2002).

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OPINION BELOW

The opinion of the court of appeals (App. 31-32) is unpublished but referenced in a "Table of Decisions Without Reported Opinion" as *United States v. D&J Enterprises, Inc.*, 37 Fed.Appx. 504, 2002 WL 1155329 (11th Cir.2002).

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2002. A petition for rehearing and rehearing en banc was denied on July 2, 2002. (App. 3-4). On September 10, 2002, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including October 30, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, the petitioner, a corporation, was found guilty of violating 42 U.S.C. Sections 7413(c)(1), 7671g, and 40 C.F.R. Section 82.154(a), by releasing freon during a demolition. The petitioner filed a petition for writ of error coram nobis seeking a new trial or alternatively, an evidentiary hearing, based upon the denial of its Sixth Amendment right to effective assistance of counsel.[1] The

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[1] The writ of error coram nobis fills a statutory gap for defendants in federal criminal cases whose convictions are subject to collateral attack for denial of the Sixth Amendment right to effective assistance of counsel, but who are not in custody or otherwise not entitled to relief under the federal habeas corpus statute, 28 U.S.C. §

petitioner alleged that after the trial, it learned for the first time that the same Office of the United States Attorney which was prosecuting the petitioner had filed a pretrial "Sealed Motion to Conduct Inquiry of Defendant Regarding Conflict of Interest of Trial Counsel and Incorporated Memorandum of Law" (App. 2-8) which was served upon petitioner's trial counsel but not upon the petitioner. In its sealed pretrial motion, the government revealed to the district judge that it was conducting a criminal investigation of petitioner's counsel. The government requested that the district judge conduct a hearing at which the district judge would advise the petitioner of the following: that petitioner's trial counsel "is currently a subject of a grand jury investigation being conducted in the same district and by the same United States Attorney's Office that is prosecuting [petitioner]"; that petitioner's trial counsel "may be prosecuted in the same district and by the same United States Attorney's Office that is prosecuting [petitioner]"; that petitioner's trial counsel's "energies and attention may be diverted from the [petitioner's] defense in this case to his own defense..."; that petitioner's

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2255. Recognizing this gap, this Court held in *United States v. Morgan*, 346 U.S. 502, 505 n.4 (1954) that the common law petition for coram nobis relief is available in such situations, even though the procedure authorizing the issuance of the writ was abolished for civil cases by Fed.R.Civ.P. 60(b). District courts are authorized to issue the writ pursuant to the All Writs Act. 28 U.S.C. § 1651(a). The writ of coram nobis has been recognized as the appropriate vehicle for a corporation to raise an ineffective assistance of counsel claim. See *United States v. Mett*, 65 F.3d 1531 (9th Cir.1995); *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 744 (3d Cir.1979) ("Courts regularly have allowed corporations to petition for coram nobis.").

trial counsel "may have an incentive to curry favor with the United States Attorney's Office..."; and that the petitioner "has the right to seek separate counsel...". (App. 7).

Petitioner's trial counsel, who never disclosed to the petitioner the government's investigation, filed a sealed response to the government's motion which he did not serve upon or otherwise disclose to the petitioner. (App. 9-10). In his sealed response, petitioner's counsel argued that because he was "merely" a "subject" of the grand jury investigation, there should be no disclosure to the petitioner.

The judicial inquiry requested by the government was never conducted and neither petitioner's counsel nor the district judge disclosed to the petitioner the pending grand jury investigation of petitioner's counsel. The case proceeded to jury trial. After the petitioner was found guilty as charged, the district judge entered a written order directing judgments of acquittal. The government appealed and the court of appeals reversed and remanded with directions to reinstate the verdicts. See *United States v. D&J Enterprises, Inc.*, 136 F.3d 140 (11th Cir.1998).

The petitioner, after successfully moving to unseal the record, alleged that a new trial was required under the so-called "automatic reversal" rule of *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) because the government's pretrial objection to the conflict of interest issue triggered the district court's constitutional obligation to conduct an inquiry and disclose the conflict to the petitioner. The petitioner alternatively sought an evidentiary hearing based upon specified instances of ineffective assistance of counsel. (App. 11-29). The petitioner's claims were summarily denied by the district court and the petitioner appealed to the court of appeals. (App. 30).

After oral argument, but before the court of appeals issued a ruling, this Court decided *Mickens*. In that case, a

state prisoner convicted of murder claimed for the first time in federal habeas proceedings that his state trial counsel operated under a conflict of interest in violation of the Sixth Amendment right to effective assistance of counsel. Federal habeas counsel discovered that the petitioner's trial counsel was representing the murder victim at the time of the murder and that the presiding state trial judge knew of the representation. The conflict of interest issue was not raised by anyone at the trial court level.

The district court afforded Mickens an evidentiary hearing and thereafter denied his habeas petition. *Id.* at 1240. Mickens appealed and the Fourth Circuit affirmed. *Id.* This Court granted review to determine Mickens' burden.

This Court found that the automatic reversal rule of *Holloway* did not apply because there was no objection that triggered the state trial court's duty to conduct an inquiry into the possible conflict of interest. Rather, the applicable rule was that of *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), where the conflict of interest issue was first raised after trial. Applying that rule, this Court held that in order to obtain relief, Mickens was required to show that the conflict of interest adversely affected his counsel's performance.

After the parties in the instant case submitted letter briefs to the court of appeals addressed to the applicability of *Mickens,* the court of appeals affirmed based upon the following reasoning:

> In light of *Mickens v. Taylor*, 122 S.Ct. 1237 (2002), the judgment of the district court is affirmed. Appellant D&J Enterprises has not adequately demonstrated that a "conflict of interest adversely affected [defense] counsel's performance" at trial. *Id.* Because we have resolved this matter on direct appeal,

D&J's petition for coram nobis is now moot.

(App. 31-32).

ARGUMENT

1. In *Mickens*, a state prisoner sentenced to death for murder filed for federal habeas corpus relief claiming for the first time that his state court trial counsel operated under a conflict of interest in violation of the Sixth Amendment right to effective assistance of counsel. Mickens' federal habeas counsel discovered that Mickens' state trial counsel was the murder victim's counsel at the time of the murder and that the presiding state trial judge was aware of the representation. This Court granted review to determine Mickens' burden.

En route to answering the question, this Court reviewed several of its key rulings addressing conflicts of interest under the Sixth Amendment. The Court initially noted that ordinarily, a defendant seeking relief for the denial of his right to effective assistance of counsel in violation of the Sixth Amendment must show "prejudice" pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) by demonstrating a reasonable probability that the result of the proceeding would have been different had defense counsel not committed the errors in question. But an exception is recognized "when the defendant's attorney actively represented conflicting interests." *Mickens,* 122 S.Ct. at 1241. To determine whether the exception applied to Mickens' case, the Court reviewed several of its conflict of interest cases commencing with the "automatic reversal" rule of *Holloway*. In *Mickens*, the Court explained *Holloway* as follows:

> In *Holloway* [cite omitted] defense counsel had

objected that he could not adequately represent the divergent interests of three codefendants. *Id.*, at 478-480, 98 S.Ct. 1173. Without inquiry, the trial court had denied counsel's motions for the appointment of separate counsel and had refused to allow counsel to cross-examine any of the defendants on behalf of the other two. The Court deferred to the judgment of counsel regarding the existence of a disabling conflict, recognizing that a defense attorney is in the best position to determine when a conflict exists, that he has an ethical obligation to advise the court of any problem, and that his declarations to the court are "virtually made under oath." *Id.* at 485-486, 98 S.Ct. 1173 (internal quotation marks omitted). *Holloway* presumed, moreover, that the conflict, "which [the defendant] and his counsel tried to avoid by timely objections to the joint representation," *id.*, at 490, 98 S.Ct. 1173, undermined the adversarial process. The presumption was justified because joint representation of conflicting interests is inherently suspect, and because counsel's conflicting obligations to multiple defendants "effectively sea[l] his lips on crucial matters" and make it difficult to measure the precise harm arising from counsel's errors. *Id.*, at 489-490, 98 S.Ct. 1173. *Holloway* thus creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict. *Id.*, at 488, 98 S.Ct. 1173 ("[W]henever a trial court improperly requires joint representation over timely objection reversal is automatic").

Mickens, 122 S.Ct. at 1241-42.

The Court in *Mickens* next addressed *Cuyler v. Sullivan*, *supra*, explaining that *Holloway*'s automatic reversal rule did not apply to the facts of *Sullivan* because "[n]either counsel nor anyone else objected to the multiple representation...". *Mickens*, 122 S.Ct. at 1242 (e.s.). The Court summarized the holding in *Sullivan* as follows: "[A]bsent objection, a defendant must demonstrate that 'a conflict of interest actually affected the adequacy of his representation.'" *Id*. See also *Sullivan*, 446 U.S. at 348, 100 S.Ct. at 1718 ("In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.") (e.s.)

In *Mickens*, this Court also clarified its holding in *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). The Court noted that *Wood* did not announce a new rule or an expansion of *Holloway*. In *Wood*, there was no objection to the possible conflict of interest. Thus, the Court explained, the rule of *Sullivan* was applicable to the facts in *Wood*. *Mickens*, 122 S.Ct. at 1243.

The Court in *Mickens* then addressed the rule proposed by Mickens that a conviction should be automatically reversed, as in *Holloway*, "when there existed a conflict that did not affect counsel's performance, but the trial judge failed to make the *Sullivan*-mandated inquiry...". *Mickens*, 122 S.Ct. at 1244. The Court rejected Mickens' proposed rule, reiterating that the automatic reversal rule of *Holloway* requires an objection that triggers the trial court's duty to conduct an inquiry into the possible conflict of interest. In the absence of any objection, the *Sullivan* rule applies. See *Mickens*, 122 S.Ct. at 1244 ("[T]he rule applied when the trial judge is not aware of the conflict (and thus not obligated to inquire) is that prejudice will be presumed only if the conflict has significantly affected counsel's performance --

thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown. See *Sullivan*, *supra*, at 348-349, 100 S.Ct. 1708."). Therefore, the Court held, in order to obtain relief, Mickens was required to show that the conflict of interest adversely affected his counsel's performance.

In sum, *Mickens* was controlled by the *Sullivan* rule which applies when no objection is made at the trial level to a possible conflict of interest. See *Mickens*, 122 S.Ct. at 1245. ("Lest today's holding be misconstrued, we noted that the only question presented was the effect of a trial court's failure to inquire into a potential conflict upon the *Sullivan* rule that deficient performance of counsel must be shown."). Had there been an objection lodged in the trial court in *Mickens*, the automatic reversal rule of *Holloway* would have applied. See also *Mickens*, 122 S.Ct. at 1252 n.11 (Stevens, J. dissenting) ("The Court concedes that if Mickens' attorney had objected to the appointment based upon the conflict of interest and the trial court judge had failed to inquire, then reversal without inquiry into adverse affect would be required."). Consistent with the *Sullivan* rule, as a predicate to relief, Mickens' burden was to show that the conflict adversely affected trial counsel's performance due to the absence of an objection which would have triggered the trial court's obligation to inquire.

By contrast, in the case at bar, a pretrial objection was lodged to the possible conflict of interest. The government objected in its pretrial "Sealed Motion to Conduct Inquiry of Defendant Regarding Conflict of Interest of Trial Counsel and Incorporated Memorandum of Law." (App. 2-8). The sealed motion disclosed to the district judge, but not to the petitioner, that the petitioner's trial counsel was under grand jury investigation by the same prosecutor's office. The

government requested that the district judge disclose the potential conflict of interest to the petitioner and conduct an inquiry in accordance with several authorities, including *United States v. McLain*, 823 F.2d 1457 (11th Cir.1987), *United States v. DeFalco*, 644 F.2d 132 (3d Cir.1980) (en banc), and *United States v. Garcia*, 517 F.2d 272 (5th Cir.1975). The government alleged the following, in relevant part:

> In conducting the inquiry, the Court should advise [petitioner] of the specific nature of the conflict of its attorney, and further advise [petitioner]:
>
> (1) that its attorney is currently a "subject" of a grand jury investigation being conducted in the same district and by the same United States Attorney's Office that is prosecuting [petitioner];
>
> (2) that this attorney may be prosecuted in the same district and by the same United States Attorney's Office that is prosecuting [petitioner];
>
> (3) that the attorney's energies and attention may be diverted from the defendant's defense in this case to his own defense;
>
> (4) that the attorney may have an incentive to curry favor with the United States Attorney's Office;
>
> (5) that [petitioner] has the right to seek separate counsel; and
>
> (6) that if [petitioner] now cannot afford other retained counsel, the Court could appoint such counsel upon a

proper finding of indigence.

> The United States also respectfully requests the Court to invite [petitioner] to question the Court regarding the nature and consequences of continued representation by its counsel and to seek a narrative response indicating that [petitioner] has been advised of its rights and understands the potential conflicts and perils of its present representation.

(App. 7-8). The government's conflict of interest claim was vigorous, unambiguous, and supported by personal knowledge of its own grand jury investigation of petitioner's trial counsel.

Petitioner's trial counsel kept the grand jury investigation secret from the petitioner (thereby keeping his fee) and filed a sealed response claiming that the petitioner should not be advised of the grand jury investigation. The petitioner's trial counsel made the conclusory (and obviously self-serving) argument that because he was a "subject" of the grand jury investigation, rather than a "target", there was no need to disclose the grand jury investigation to the petitioner. The district judge did not conduct the inquiry requested by the government and the record is silent as to the basis for the district judge's failure. The petitioner did not learn of the government's claim of conflict of interest or that there was a concurrent grand jury investigation of its trial counsel until after the jury verdict of guilt.

Certiorari review is sought to resolve the following important question: where the government lodges a pretrial objection raising defense counsel's potential conflict of interest arising from the government's pending grand jury investigation of counsel which could result in counsel's indictment, and the government alleges that defense counsel

therefor has incentive to curry favor with the government during the defendant's trial to the detriment of zealous representation of the defendant, but the trial judge conducts no inquiry of the defendant, and the potential conflict of interest is kept secret from the defendant until after an adverse verdict, is automatic reversal required under *Holloway*, or must the defendant first meet the *Mickens/Sullivan* burden of showing that the potential conflict adversely affected counsel's performance? The court of appeals reasoned that the rule of *Mickens* controls. The petitioner contends that the court of appeals misread *Mickens* and that the *Holloway* rule applies here for the following several reasons.

First, a pretrial objection to the conflict of interest issue was raised. As *Mickens* explains, such an objection triggers the trial court's obligation to inquire under *Holloway*. The petitioner in *Mickens* was held not entitled to automatic reversal because of the lack of objection.

Second, the automatic reversal rule in *Holloway*, which in that case was triggered by defense counsel's objection to multiple representation, is even more appropriate where the objection is lodged by the government based upon its grand jury investigation of defense counsel. That is because in the case of an attorney such as petitioner's trial counsel, who unethically fails to disclose the grand jury investigation to his client, see *McLain*, only the government is left to raise the issue. It is the government, after all, which solely possesses the investigatory knowledge that defense counsel may be indicted and has the incentive to"pull punches" in the defense of the defendant in order not to "unnecessarily" antagonize the prosecutor. See *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir.1992) (criminal investigation of defense counsel "may induce the lawyer to pull his punches in defending his client lest the prosecutor's office be angered by an acquittal and retaliate against the

lawyer."). Thus, the government stands in the same shoes as the defense counsel in *Holloway* -- both are in the best position to determine that a conflict exists, both have an ethical obligation to advise the court of any problem, and both make declarations to the court that are "virtually made under oath." *Id.* at 485-486, 98 S.Ct. 1173 (internal quotation marks omitted). And it is the unethical lawyer, *i.e.*, the one who keeps the investigation secret from his client, who is most likely to afford the client something less than the uncompromising advocacy guaranteed by the Sixth Amendment, particularly where, as here, the government's case is far from overwhelming (as evidenced in large part by the district judge's acquittal of the petitioner notwithstanding the jury verdict).

Third, the "evil" recognized in *Holloway* in the context of joint representation, which added support to the applicability of the rule of automatic reversal, is identical to the evil present here. The evil "is in what the advocate finds himself compelled to *refrain* from doing...". *Holloway*, 435 U.S. at 491, 98 S.Ct. at 1182. The Court reasoned in *Holloway* that it would be too difficult, if not "virtually impossible", for a defendant to prove what his attorney refrained from doing as a result of multiple representation, and any inquiry into a claim of harmless error would require "unguided speculation." *Id.* Similarly here, it is what petitioner's trial counsel refrained from doing in his representation of the petitioner as a result of his service to two masters, *i.e.*, the prosecutor and himself, that is not subject to proof. The petitioner should not be held to what in *Holloway* this Court deemed to be an unfair and nearly impossible burden. The policy considerations in the two contexts are identical.

It should be no answer that the government's investigation of petitioner's trial counsel possibly did not

adversely affect his representation of the petitioner. Indeed, this Court in *Holloway* recognized that joint representation does not necessarily pose a disadvantage to defendants. In fact, at times, joint representation is advantageous to the defense. See *Holloway*, 435 U.S. at 482, 98 S.Ct. at 1178 ("Requiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation."). Nevertheless, this Court ruled in *Holloway* that automatic reversal is required when the trial judge fails to inquire after the trial court has been placed on notice that there is a possibility of a conflict due to multiple representation.

The reasoning of *Holloway* and *Sullivan* is not limited to only one type of conflict of interest, such as multiple representation. Indeed, *Wood* did not involve multiple representation, yet the Court applied the same rules which govern multiple representation cases. In fact, the grand jury investigation of petitioner's trial counsel arguably gave rise to a conflict of interest more serious than the conflict that might arise in the joint representation context. As the Second Circuit stated: "What could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities?" *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir.1983).

This Court is respectfully requested to resolve the important questions presented in this case.

2. The petitioner also seeks review to resolve the conflict between the decision of the court of appeals in this case and the decision in *Armienti v. United States*, 234 F.3d

820 (2d Cir.2000). In *Armienti*, the defendant's lawyer was being criminally investigated by the same United States Attorney's office that was prosecuting the defendant. The defendant alleged numerous instances of specific deficiencies as the product of the conflict, including insufficient investigation, inadequate cross-examination, and failure to make objections. The defendant alleged that his lawyer's own criminal investigation caused him to be distracted and ill-prepared. The Second Circuit held that such allegations constitute "a sufficient showing to require the district court to hold an evidentiary hearing to determine whether there was an actual conflict of interest and, if so, whether the conflict adversely affected his lawyer's performance." *Id.* at 825.

In direct conflict with *Armienti*, the court of appeals in the case at bar affirmed the summary denial of the petitioner's ineffective assistance of counsel claim which was identical to the defendant's in *Armienti* where the court of appeals ordered an evidentiary hearing. Review by this Court is requested to resolve the conflict.

3. After the court of appeals rendered its decision in this case, the Ninth Circuit decided *Campbell v. Rice*, 302 F.3d 892 (9th Cir.2002). In that case, a defendant was being prosecuted in state court when an in-chambers hearing conference was held. The defendant was excluded from the hearing. The judge was advised by the prosecutor that he was prosecuting defense counsel on unspecified charges (but, unlike in the case at bar, the prosecutor apparently did not lodge a pretrial objection to defense counsel's representation). The judge ruled that there was no conflict. The defendant was convicted and sought federal habeas corpus relief after exhausting state remedies. The Ninth Circuit found that the case presented the scenario of the trial court knowing of a potential conflict of interest and failing to make an inquiry.

Id. at 897. Thus, the Ninth Circuit reasoned, the defendant was required, pursuant to *Mickens*, to show that the conflict adversely affected counsel's performance. The California Court of Appeals analyzed the potential adverse effect of the alleged conflict upon counsel's performance and concluded there was no adverse effect. The Ninth Circuit held that conclusion of the California Court of Appeals was not shown to be "objectively unreasonable" so as to warrant habeas corpus relief. *Id.*

However, the Ninth Circuit did find that the exclusion of the defendant from the in-chambers conference denied him his fourteenth amendment due process right to be present at a critical stage of the criminal proceedings. The court of appeals ordered a new trial upon the reasoning that the error was "structural" and therefore not subject to harmless error analysis.

Similarly here, the petitioner was excluded from the sealed proceedings wherein the conflict of interest was discussed by the district judge, prosecutor, and defense counsel. Upon learning of his exclusion, the petitioner sought a new trial on the grounds that the trial judge should have included him, advised him of the prosecutor's objection, and allowed him the right to seek new counsel or waive the conflict. This "structural" error entitles the petitioner to a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL MORRIS
Attorney for Petitioner

OCTOBER 2002

APPENDIX

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APP.

GOVERNMENT'S SEALED MOTION TO CONDUCT INQUIRY OF DEFENDANT REGARDING CONFLICT OF INTEREST OF TRIAL COUNSEL AND INCORPORATED MEMORANDUM OF LAW 2-8

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-756-CR-DAVIS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
v.)
)
D & J ENTERPRISES, INC.)
)
Defendant.)

UNDER SEAL
SEALED MOTION TO CONDUCT INQUIRY OF DEFENDANT REGARDING CONFLICT OF INTEREST OF TRIAL COUNSEL AND INCORPORATED MEMORANDUM OF LAW

The United States of America respectfully requests this Court to hold a hearing at which it will advise the defendant, D & J Enterprises, Inc., (D&J), of trial counsel's potential conflict of interest and assure that any waiver of that conflict by D&J is knowing and voluntary. In support of this motion the government submits the following memorandum of law.

MEMORANDUM OF LAW

On September 26, 199.5, a federal grand jury indicted D&J, together with two (2) individuals, on charges of conspiracy to vent ozone depleting chemicals into the atmosphere, in violation of Title 18, United States Code, Section 371 (Count I) and a substantive charge of venting ozone depleting chemicals in violation of 42 U.S.C. §§ 7413(c)(1) and 767lg, and 18 U.S.C. § 2 (Count II).

On October 10, 1995; defendant D&J was arraigned on

the charges and is currently awaiting trial.

A. D&J's Counsel Is a "Subject" of a Grand Jury Investigation.

Defendant has retained Fred A. Schwartz, Esq., of Adorno & Zeder, P.A., as trial counsel. Mr. Schwartz is currently a "subject" of a grand jury investigation in the Southern District of Florida, and he has so been advised.

B. Applicable Law.

In circumstances where a defendant and his attorney are being prosecuted and investigated, respectively, in the same district and by the same United States Attorney's Office, the district court must conduct a hearing in which the defendant is personally advised of the facts and of his right to conflict-free assistance of counsel. The inquiry is akin to that conducted when co-defendants are represented by the same attorney or by attorneys who are associated in the practice of law, as required by Federal Rule of Criminal Procedure 44(c) and United States v. Garcia, 517 F.2d 272 (5th Cir. 1975). See United States v. McLain, 823 F.2d 1457,1463-64 (11th Cir. 1987).

The Eleventh Circuit in McLain confronted a situation in which one of the defendants discovered after trial that his attorney had been under investigation before and during the trial by the same United States Attorney's Office which had prosecuted him. The attorney was subsequently indicted. The Eleventh Circuit held that the failure to have advised the

defendant of the conflict between his interests and those of his counsel deprived him of a fair trial. Even though the defendant had failed to object at trial, the Eleventh Circuit found that he had demonstrated that "an actual conflict of interest adversely affected his lawyer's performance." Id. at 1463 (quoting Cuyler v. Sullivan,466 U.S. 335, 348 (1980)).

The actual conflict was present in McLain because of (a) the attorney's interest in prolonging the defendant's trial in order to forestall the attorney's own indictment, and (b) the attorney's failure to fully advise the defendant of the possibilities of a plea, perhaps so that the attorney could reserve certain tactics for his own upcoming plea negotiations. McLain, 823 F.2d at 1464.The United States does not suggest that such tactics have occurred in this case, but simply notes that failure to conduct an appropriate inquiry could well result in reversible error under McLain.

In a case where appellate counsel entered into his own plea agreement several days before the defendant's appeal was decided, the Third Circuit similarly found that the defendant had been denied effective assistance of counsel. United States v. DeFalco,644 F.2d 132, 136 (3rd Cir. 1980) (en banc). In DeFalco, the defendant learned during the pendency of his appeal that his attorney had been indicted in the same district and was being prosecuted by the same United States Attorney's Office. The attorney assured the defendant that his own charges were meritless and that he would vigorously represent the defendant on the appeal.

The attorney subsequently entered his plea in the presence of the same district judge who had presided over his client's trial.

The Third Circuit reasoned that the principle of effective representation necessarily includes a defense lawyer's "ability to act independently of the-government and to oppose it in adversary litigation." Id. at 136 (quoting Ferri v. Ackerman, 444 U.S. 193, 204 (1979)). The Third Circuit continued:

> The competent advocate must stand tall before the appellate tribunal and assert his client's contentions without fear or favor. This is not the posture a defendant in a criminal case assumes as he goes, hat in hand, to negotiate a plea bargain with his adversary. Nor is it the posture a defendant in a criminal case assumes as he appears before the trial court following a plea of guilty to beg the mercy of the court before sentence is pronounced.

Id. Because the defendant in DeFalco had been aware of his attorney's situation, the Third Circuit remanded the case to allow the government to show at a hearing that the defendant had knowingly and deliberately waived his right to effective assistance of counsel. If the government could not make that showing, a new appeal would be granted. Id. at 137. See also Briguglio v. United States, 675 F.2d 81 (3d Cir. 1982) (case remanded for a hearing where counsel knew he was under investigation by the same United States Attorney's Office, but

defendant was not so informed); Government of the Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984) (new trial ordered for defendant whose attorney faced potential criminal liability for same crime and the attorney's stipulation of facts became evidence against his client).

Although the facts in the instant case can be distinguished from DeFalco (i.e., unlike in DeFalco, Schwartz is not under indictment), the reasoning of DeFalco and more directly McLain appears to be sufficiently applicable to require a hearing. A waiver of the right to conflict-free counsel must "not only be voluntary but also [a] knowing [and] intelligent act [] done with sufficient awareness of the relevant circumstance and likely consequences." Garcia, 517 F.2d at 276 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)). Accord United States v. Petz, 764 F2d 1390, 1392-93 (11th Cir. 1985). Specifically,

> the district court should address [the] defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from [the] defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible perils of such a conflict, that he had discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. It is, of course, vital that the

> waiver be established by "clear, unequivocal, and unambiguous language." Mere assent in response to a series of questions from the bench may in some circumstance constitute an adequate waiver, but the court should nonetheless endeavor to have [the] defendant personally articulate in detail his intent to forego this significant constitutional protection.

Garcia, 517 F.2d at 278 (citations omitted).

CONCLUSION

Based upon these authorities, the United States respectfully requests the Court to conduct a hearing in conformity with McLain, DeFalco, Rule 44(c), and Garcia. In conducting the inquiry, the Court should advise D&J of the specific nature of the conflict of its attorney, and further advise D&J: (1) that its attorney is currently a "subject" of a grand jury investigation being conducted in the same district and by the same United State Attorney's Office that is prosecuting D&J; (2) that this attorney may be prosecuted in the same district and by the same United State Attorney's office that is prosecuting D&J; (3) that the attorney's energies and attention may be diverted from the defendant's defense in this case to his own defendant; (4) that the attorney may have an incentive to curry favor with the United States Attorney's Office; (5) that D&J has the right to seek separate counsel; and (6) that if D&J now cannot afford other retained counsel, the Court could appoint such counsel upon a proper finding

of indigence.

The United States also respectfully requests the Court to invite D&J to question the Court regarding the nature and consequences of continued representation by its counsel and to seek a narrative response indicating that D&J has been advised of its rights and understands the potential conflicts and perils of its present representation.

Respectfully yours,
KENDALL COFFEY
UNITED STATES ATTORNEY

By:_____
THOMAS A WATTS-FITZGERALD
ASSISTANT UNITED STATES ATTORNEY
Fla. Bar No# 0273538
99 N.E. 4th Street, 6th Floor
Miami, FL 33132-2111
Tel. (305) 536-3000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Sealed Motion to Conduct Inquiry of Defendant Regarding Conflict of Interest of Trial Counsel was mailed this 29th day of November, 1995 to Fred A. Schwartz, Esq. 2601 S. Bayshore Drive, Ste. 1600, Miami, FL 33133.

_____
THOMAS A. WATTS-FITZGERALD
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-756-CR-DAVIS

UNITED STATES OF AMERICA,)
)
v.)
)
D & J ENTERPRISES, INC.)
et al.)

UNDER SEAL
RESPONSE TO INQUIRY OF DEFENDANT REGARDING CONFLICT OF INTEREST OF TRIAL COUNSEL AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, counsel to D & J Enterprises, Inc., Defendant, and in response to the Government's sealed motion to conduct inquiry of Defendant regarding conflict of interest counsel and incorporated memorandum of law and states as follows:

1. A similar motion to the instant motion has been filed before, as to undersigned counsel, in the Southern District of Florida. Both this Court, in a previous case, and the Honorable James Lawrence King in another case have reviewed this matter and have ruled the necessity from a McClain type hearing does not apply to someone who is a subject of a Grand Jury investigation. For that reason, counsel would request that this Court deny the motion and further advise the United States Attorney that it is not necessary to file this type of motion in cases where an attorney is a subject of a Grand Jury investigation.

WHEREFORE, it is respectfully requested that this Court deny the instant motion regarding this three year old investigation.

Respectfully Submitted:

FRED A. SCHWARTZ, P.A.

BY:_____

FRED A. SCHWARTZ
2601 S. Bayshore Drive
Suite 1600
Miami, Florida 33133
(305) 858-5555

Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of December, 1995, to: Thomas A. Watts-Fitzgerald, Assistant United States Attorney, 99 N.E. Fourth Street, Miami, Florida 33130.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 95-756-CR-DAVIS

UNITED STATES OF AMERICA,

Plaintiff,

v.

D&J Enterprises,

Defendant.

UNDER SEAL
PETITION FOR WRIT OF ERROR CORAM NOBIS
AND SUPPORTING MEMORANDUM OF LAW

The defendant, D&J Enterprises [D&J], through undersigned counsel, respectfully requests coram nobis relief in the form of a new trial based upon the following grounds:

1. D&J is a corporation which, following a jury trial, was found guilty, along with co-defendant Phillips, of conspiracy to release the refrigerant gas R-22 and conspiracy to conceal the release in violation of 18 U.S.C. § 371 (count one); and knowing release of R-22 in violation of 42 U.S.C. §§ 7413(c)(1), 7671g and 40 C.F.R. § 82.154(a) (count two).

2. Following the jury verdict, this court entered judgments of acquittal. The government appealed and the Eleventh Circuit ordered the reinstatement of the verdict. *U.S. v. D&J Enterprises, Inc.*, 136 F.3d 140 (11th Cir.1998).

3. The writ of coram nobis is the appropriate vehicle for a corporation to raise an ineffective assistance of counsel claim. See *United States v. Mett*, 65 F.3d 1531 (9th Cir.1995); *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 744 (3d Cir.1979) ("Courts regularly have allowed corporations to petition for coram nobis."). Such a petition is to be docketed in the original criminal proceeding and not as a separate civil case. *United States v. Tyler*, 413 F.Supp. 1403 (M.D.Fla.1976).

4. The basis for the relief sought is the ineffective assistance of counsel afforded D&J by its trial counsel, Fred Schwartz. Unbeknownst to D&J at the time Schwartz was retained as its trial counsel, the same Office of the United States Attorney which was prosecuting D&J was investigating Schwartz for the commission of various crimes. On May 16, 1995, the U.S. Attorney's Office questioned Schwartz before the grand jury about his alleged violations of 18 U.S.C. § 1503 and other related statutes involving obstruction of justice. The Office of the United States Attorney filed a motion under seal requesting that this court inform D&J of the investigation. Schwartz responded under seal, rather than inform D&J, and thereafter kept the investigation secret from D&J for his own pecuniary benefit. D&J was never informed of the investigation and no hearing was held.

5. Also unbeknownst to D&J, Schwartz was neither mentally nor physically competent to represent D&J. By his own admissions and allegations, "... on or before May 18, 1994, Schwartz became disabled from continuing to perform the duties of his job as a trial lawyer and as a partner in the law firm of Adorno Zeder due to an acute and severe medical condition which was caused or aggravated by continuing to practice his specialty as a trial lawyer." (This petition is accompanied by a separately bound appendix referred containing the exhibits referenced herein) (Exhibit A).

6. Schwartz failed to disclose the foregoing in order to keep the fee he collected from D&J. Due to his inability to work, he was in financial straits and needed the money. Schwartz'

financial troubles also prompted a Florida Bar investigation into his misuse of trust funds which involved amounts exceeding $200,000.

7. Had D&J known either that Schwartz was under investigation by the same Office of the United States Attorney prosecuting D&J or that Schwartz was medically unfit to practice law, D&J would not have retained Schwartz or would have fired him and hired conflict-free and competent counsel.

8. D&J seeks a new trial based upon its claims detailed below, or in the event of factual disputes, an evidentiary hearing upon its claims.

MEMORANDUM OF LAW
Background Facts

On September 26, 1995, D&J, along with co-defendant Raymond Buck Phillips, were indicted for conspiracy to release the refrigerant gas R-22 and conspiracy to conceal the release in violation of 18 U.S.C. § 371 (count one); and knowing release of the gas in violation of 42 U.S.C. §§ 7413(c)(1), 7671g and 40 C.F.R. § 82.154(a) (count two).

On October 10, 1995, attorney Fred Arthur Schwartz entered his appearance as counsel for D&J. (See Docket Entry 7).

Unbeknownst to D&J, on November 29, 1995, the government served, under seal, a "Sealed Motion to Conduct Inquiry of Defendant Regarding Conflict of Interest of Trial Counsel and Incorporated Memorandum of Law." (Exhibit B). The government's motion sought a hearing wherein this court would advise D&J of Schwartz' potential conflict of interest and determine whether D&J would waive the conflict or obtain new counsel. Among other decisional authorities, the motion cited *United States v. McLain*, 823 F.2d 1457 (11th Cir.1987), *overruled on other grounds by United States v. Watson*, 866 F.2d 381, 385 n.3 (11th Cir.1989) for the proposition that "[i]n circumstances where a defendant and his attorney are being prosecuted and investigated, respectively, in the same district and by the same United States Attorney's

Office, the district court must conduct a hearing in which the defendant is personally advised of the facts and of his right to conflict-free assistance of counsel. *Id.*, at 2, ¶ B. The government noted that "*McLain* appears to be sufficiently applicable to require a hearing." *Id.*, at 5. The government requested that at the hearing, this court would advise D&J of the following: "(1) that its attorney is currently a 'subject' of a grand jury investigation being conducted in the same district and by the same United States Attorney's Office that is prosecuting D&J; (2) that this attorney may be prosecuted in the same district and by the same United States Attorney's Office that is prosecuting D&J; (3) that the attorney's energies and attention may be diverted from the defendant's defense in this case to his own defense; (4) that the attorney may have an incentive to curry favor with the United States Attorney's Office; (5) that D&J has the right to seek separate counsel...". *Id.* at 6.

Schwartz did not inform D&J of the motion filed by the government. Nor, needless to say, did he inform D&J of the grand jury investigation at all. Rather, on December 1, 1995, he filed a response under seal which he kept from D&J. (Exhibit C: "Response to Inquiry of Defendant Regarding Conflict of Interest of Trial Counsel and Incorporated Memorandum of Law"). In his response, Schwartz characterized himself as a "subject" rather than a "target" of the grand jury investigation and argued that Judge King had ruled in another case (not identified by Schwartz) that *McLain* does not apply to a subject of a grand jury investigation. Schwartz' strategy, as discussed below, was to stay on the case and keep the fee even if the best interests of D&J were not served thereby because Schwartz was in economic distress. In so doing, Schwartz violated not only D&J's constitutional rights, but also his ethical obligations to D&J. The then applicable Rule 4-1.7 of the Rules Regulating the Florida Bar, Rules of Professional Conduct, provided: "A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited ... by the lawyer's own interest ...".

Also unbeknownst to D&J, Schwartz had withdrawn from the law firm of "Adorno Zeder" in August 1994 and submitted a disability claim to UNUM. On October 20, 1994, UNUM denied the claim. On July 5, 1995, Schwartz filed in this court a declaratory action against UNUM Life Insurance Company of America [UNUM], his disability carrier. (Exhibit A). D&J was not aware of the lawsuit. Schwartz alleged in the lawsuit that he was unable to practice in his specialty which was the defense of criminal matters at the federal trial level. In support of the lawsuit, Schwartz prepared an affidavit. (Exhibit D). Schwartz stated in his affidavit that he was suffering from the disease of severe ulcerative colitis which resulted in "frequent and constant trips to the bathroom, accidents of bowel incontinence, and inability to fully perform my duties as a trial lawyer in federal court without great inconvenience, pain, increasing symptoms and more frequent problems." (Exhibit D, ¶ 5). Schwartz further averred in his affidavit that in May of 1994, the symptoms increased while he was preparing for trials causing him to see Dr. Monroe I. Scheiner who conducted a colonoscopy and "recommended that I stop practicing as a trial lawyer in federal court." (*Id.*, at ¶ 6). Schwartz stated that even though his condition "continued to affect me in my practice", he did not completely stop practicing law because he needed the money. (*Id.*, at ¶ 9).

Dr. Scheiner executed an affidavit dated December 5, 1996 in which he stated the following:

Based on my experience, training, and education, as well as my familiarity with this patient and the association between his activities preparing for and appearing in trials and the exacerbation of symptoms of his ulcerative colitis, it is my opinion within a reasonable degree of medical probability that Mr. Schwartz should abstain from practice as a trial attorney. I believe that continuing to practice as a trial attorney will severely aggravate and exacerbate Mr. Schwartz' medical condition and greatly increase the incidence of flare ups of his ulcerative colitis. Continuing to undergo the stress associated

with trial work will also greatly increase Mr. Schwartz' chances of further complications including (1) Long term use of steroid medication with its attendant side effects, (2) the likelihood of requiring surgical intervention for an ileostomy (use of a bag to collect fecal waste) or a total colectomy (ileo-anal anastomosis), and (3) the possibility of developing colon cancer.

(Exhibit E at 3-4).

In a subsequent written statement, Schwartz stated: "I live constantly in fear that during a trial, I will lose control in the courtroom." (Exhibit F). In that same statement, Schwartz concluded: "I have now been told that what I do for a living has injured me significantly in the past and caused me pain and humiliation and will continue to do that if I continue to practice law and may even cause an operation where I must end up wearing a bag because of colon problems or can cause colon cancer. Based upon this information, I am prevented from practicing law except at great risk to my health." *Id.*

Despite the foregoing, Schwartz accepted and kept the fee to represent D&J and, as mentioned, never disclosed to D&J the grand jury investigation or his medical disability. A jury trial was held from February 12-15, 1996. On February 15, 1996, D&J and Phillips were found guilty. On August 14, 1996, this court entered judgments of acquittal following the verdict. The government filed a notice of appeal. In February 1997, Schwartz advised D&J that he was closing his practice and that D&J would need new counsel for the appeal. D&J obtained new counsel. The Eleventh Circuit reversed and remanded with directions to reinstate the verdicts without stating any reasons. *U.S. v. D&J Enterprises, Inc., supra.*

In May 1998, D&J's present counsel moved to unseal the sealed record. (Exhibit G). This court granted the motion. As a result of the unsealing, for the first time, D&J learned that Schwartz had been under investigation by the grand jury appearance, that the government had moved for a *McLain* hearing, and that Schwartz had filed a secret response.

ARGUMENT

A.
THE GRAND JURY INVESTIGATION OF SCHWARTZ SHOULD HAVE BEEN DISCLOSED TO D&J, D&J WOULD HAVE HIRED CONFLICT-FREE COUNSEL, AND D&J WAS DENIED ITS CONSTITUTIONAL RIGHT TO CONFLICT-FREE COUNSEL.

1.

The government's motion for a "*McLain* hearing" should have been granted. For reasons unknown to the defendant, no such hearing was held. D&J was not informed of the grand jury investigation of Schwartz and D&J's constitutional right to conflict-free counsel was violated.

In *McLain*, an attorney in the case was under investigation by the same Office of the United States Attorney which was prosecuting his client. The Eleventh Circuit held that this situation gave rise to a conflict of interest and ordered the case retried for this, as well as other, reasons. The Eleventh Circuit noted that an attorney under such a situation is "under an ethical obligation to inform [the client] of the investigation and the possibility that it would affect [the attorney's] judgment while acting as [the client's] counsel." *Id.*, at 1464. The conflict arises because, *inter alia*, the criminal investigation of the attorney "may induce the lawyer to pull his punches in defending his client lest the prosecutor's office be angered by an acquittal and retaliate against the lawyer." *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir.1992). See also *Briguglio v. United States*, 675 F.2d 81 (3d Cir.1982).

Here, the government correctly alleged in its motion that *McLain* applied because Schwartz was being investigated by the same United States Attorney's Office that prosecuted D&J, that Schwartz might face prosecution in the same district and by the same United States Attorney's Office that was prosecuting D&J, that Schwartz' "energies and attention may be diverted from the defendant's defense in this case to

his own defense", that Schwartz "may have an incentive to curry favor with the United States Attorney's Office" and that D&J had the right to seek separate counsel. But D&J was never informed of the investigation by Schwartz, in clear violation of his ethical obligations. *McLain, supra*. Nor was D&J informed by the prosecution or this court.

The rights denied D&J are of constitutional dimension. The right to conflict-free counsel is ensured by the Sixth Amendment. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). The protections to be afforded a defendant under *McLain* are designed to afford conflict-free counsel to the accused or, alternatively, guarantee that the accused is made aware of the potential or actual conflicts and either knowingly and intelligently waive the constitutional right or be afforded the opportunity to obtain new counsel. D&J was denied these protections because Schwartz kept the facts hidden from D&J in order to keep his fee and because no judicial inquiry took place. Had D&J been informed of the grand jury investigation, D&J would have obtained other conflict-free counsel.

Prejudice must be presumed in this case. A trial judge has a duty to conduct an on-the-record inquiry of the accused when placed on notice of the **mere possibility** that counsel for an accused is laboring under a conflict of interest. *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). The violation of that duty results in a presumption of prejudice: "At trial, if a court has notice of a conflict of interest yet fails to inquire about it, 'a reviewing court will presume prejudice upon a showing of possible prejudice.'" *Johnston v. Mizell*, 912 F.2d 172, 175 (7th Cir.1990), quoting *United States v. Horton*, 845 F.2d 1414, 1418 (7th Cir.1988), citing *Holloway*, 435 U.S., at 484-01, 98 S.Ct., at 1178-82. "[A] court confronted with and alerted to possible conflicts of interest must take adequate steps ...". *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1987). The government's motion for a *McLain* hearing triggered the court's duty to conduct an

inquiry and prejudice is presumed because no hearing was conducted.

For several reasons, the violation of D&J's Sixth Amendment rights cannot be excused by the distinction argued by Schwartz in his sealed response wherein he claimed he was a "subject" rather than a "target" of the grand jury investigation. The easiest answer is that even if a meaningful distinction could be drawn in general or in this case in particular, which is doubtful as explained below, Schwartz was indeed a "target" because he was being investigated for having committed federal criminal offenses. A review of the transcript of the grand jury proceedings reveals that the Schwartz' conduct and that of his employee/investigator, Juan Cayado, was being investigated for violations of 18 U.S.C. § 1503 and other related statutes involving obstruction of justice.

Schwartz testified before the grand jury on May 16, 1995. (Exhibit H). The grand jury was investigating, *inter alia*, the bribery of witnesses and obstruction of justice in a trial in which Schwartz represented Alberto San Pedro, also known as "The Great Corrupter", and whether Schwartz and his investigator of many years, Juan Cayado, were involved in the accusations. The government was investigating the following allegations: that Cayado, while employed by and under the direction of Schwartz, knowingly obtained false affidavits from various individuals in support of San Pedro for a state perjury and/or bribery prosecution, a California murder prosecution, and possible federal charges; that witnesses disappeared; and that witnesses were provided businesses after having testified on behalf of San Pedro. Several of the individuals who executed the affidavits subsequently recanted the affidavits and reported their falsity to the authorities.

When Schwartz appeared before the grand jury, he was immediately treated like a suspect in criminal wrongdoing. Assistant United States Attorney Roger Steffin advised Schwartz of his constitutional rights as follows:

[AUSA Steffin to Schwartz]: You are a subject of the Grand Jury investigation. That means that your conduct is within the scope of the Grand Jury inquiry.

(Exhibit H at 3). Steffin then advised Schwartz that he had a fifth amendment right not to incriminate himself and confirmed that he was represented by counsel. (Ex. H at 4). Schwartz was then told: "If you feel a need to consult with [your attorney] please ask the foreperson for permission to talk to him and you will be granted that opportunity." *Id.* The advisement of rights is consistent with Schwartz' status as one of the targets of the grand jury investigation.

a.

Steffin asked Schwartz for his current status with respect to Alberto San Pedro. Schwartz responded in pertinent part: "At the present time, depending upon whether I'm a defendant, a witness, or anything, will depend upon whether I represent him in the indictment by this Grand Jury." (Ex. H at 4-5). Schwartz testified that when San Pedro sought to retain him, he advised San Pedro that he was a subject of the grand jury investigation and could not represent him until the matter was "cleared up." (Ex. H at 5). Thus, Schwartz, at the very least, considered himself a possible target and so informed San Pedro, but failed to so inform D&J or this court.

b.

Schwartz was questioned about Jose Villanueva, also known as Pipo. Villanueva was a witness in San Pedro's state trial. Villanueva had executed an affidavit in July 1991 before the trial. (Ex. H at 37-9). The affidavit was notarized by Schwartz' secretary. Schwartz testified that either Cayado, Schwartz or another counsel prepared the affidavit. Prior to executing the affidavit, Villanueva had hired his own attorney, Barry Greff. At the grand jury, Steffin asked Schwartz who had paid for Villanueva's attorney. Schwartz claimed he could not recall. Steffin asked whether San Pedro had hired the

attorney. Again, Schwartz could not recall. (Ex. H at 38). Steffin asked whether Schwartz' client, San Pedro, had played any role in Villanueva's purchase of a new business right after the trial. Schwartz answered that he had no knowledge. (Ex. H at 39).

c.

In 1991, a witness in the California murder case named Bover executed an affidavit in support of San Pedro. Bover recanted the affidavit but it was nevertheless sent to the California authorities. Schwartz was asked whether Cayado had reported to him that Bover had recanted the affidavit. Schwartz did not recall. (Ex. H at 41).

d.

Steffin asked Schwartz whether he knowingly sent false investigative reports prepared by Cayado in 1992 which reports reaffirmed several 1991 affidavits even though the various affiants had recanted to Cayado. Schwartz did not remember. (Ex. H at 44-9).

e.

Steffin asked Schwartz whether Cayado had told him that information provided by Cayado in his reports submitted to the California authorities was false. Schwartz responded in the negative. (Ex. H at 54).

f.

Steffin accused Schwartz of involvement in a scheme where affiant Pedro Alzyri was shown a photographic lineup but had been provided the key photograph ahead of time. The issue was whether Schwartz had provided to San Pedro a photograph of the California murder victim. San Pedro had given the photograph to Alzyri who thereafter claimed to the authorities that he had seen the victim alive in Brazil. Alzyri was able to select the victim's photograph from a photographic

lineup because he had been provided the photograph of the victim by San Pedro. The object of the scheme was to have the authorities believe the victim was alive and drop the California murder charge against San Pedro. (Ex. H at 55-60).

g.

Schwartz was questioned about how he obtained a private internal document from the United States Attorney's Office known as a "Prosecutive Memorandum". (Ex. H at 20). Schwartz had represented to U.S. Magistrate Snow on August 19, 1991, that he had not read the memorandum nor related its contents which revealed what witnesses had told the authorities. Steffin accused Schwartz of lying to the Magistrate as follows: [AUSA Steffin]: "It was a false statement, wasn't it?" (Ex. H at 23). Schwartz at first responded that he did not "believe" his answer was false. Id. However, upon closer questioning about a motion he filed on August 7, 1991, in which Schwartz stated that he had not read the memorandum, Schwartz admitted that his statement in the motion was false to the extent that he had looked through the memorandum. (Ex. H 23). Upon further questioning, Schwartz conceded that his statement to the Magistrate as to when and how he first encountered the memorandum was also false. (Ex. H at 29).

h.

Schwartz called Robert Duarte as a defense witness in San Pedro's perjury trial. After the prosecution cross-examined Duarte, Schwartz moved to exclude all of Duarte's testimony.

Steffin accused Schwartz of the following: knowingly suborning Duarte's perjured testimony which was obtained in exchange for a payment of $20,000; knowing that the witness was instructed to leave town immediately after his testimony; and attempting a cover-up of his (Schwartz') involvement by moving to exclude all of Duarte's testimony upon realizing that the government had tape recordings which refuted Duarte's direct examination. (Ex. H at 36-7). (Although Schwartz denied the accusations, he admitted that he had never

before and has never since moved to exclude the testimony of his own witness. (Ex. H at 37).

2.

The foregoing grand jury investigation clearly establishes that in every sense of the word, Schwartz was a "target" and not a "subject" of the grand jury investigation because he was accused of the commission of crimes. The investigation did not treat Schwartz as a simple "fact witness."

Additionally, if the government opposes a new trial for D&J by drawing a distinction between "subject" and "target" in the context of this case, then the government is once again making the same semantical argument rejected in *United States v. Garrudo*, 869 F.Supp. 1574 (S.D.Fla.1994), *affirmed sub nom. United States v. Cerceda*, 139 F.3d 847 (11th Cir.1998). In that case, the government argued that Judge Moore was not required to recuse himself because he was a "subject" rather than a "target" of a grand jury investigation. The government's argument was rejected as follows:

> The distinction between being a subject of an investigation or a target of an investigation, which the government argues, is a weak basis for distinguishing this case from *Liljeberg* [*v. Health Servs. Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)] [which addresses the standard for judicial recusal]. It does seem a matter of semantics, and, as Judge Moore knew he was being investigated, he should have recused himself.

869 F.Supp. at 1580. The court also noted the argument that the "terminology 'subject' is used rather than 'target' merely until the government has enough evidence to support a change in status" and the argument that "at the time an individual is a subject he is more likely to feel the need to cooperate with the government so as to avoid becoming a target, a status that can frequently lead to an indictment." *Id.*, at 1579.

The same reasoning applies here. When Schwartz learned that the government was investigating him for criminal activities, he had an obligation to so inform D&J. Instead, he kept the investigation a secret from D&J thereby placing his selfish pecuniary interests above his client's right to conflict-free counsel of choice. As noted above, in so doing, Schwartz also violated the Rules Regulating the Florida Bar, Rules of Professional Conduct, which were in effect at the time in question. Rule 4-1.7 provided: "A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited ... by the lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." Schwartz could not have harbored such a "reasonable" belief and it cannot be disputed that he never advised D&J, much less obtained a consent after consultation.

3.

Although as noted, prejudice should be presumed, a review of the trial transcript reveals that Schwartz could not concentrate, recall names or places, or discern critical issues that would have supported not guilty verdicts. Consequently, the record reveals that conflict of interest and/or Schwartz' disability had an adverse impact upon the defense afforded D&J and prejudiced D&J's rights to a fair trial and conflict-free counsel. Many of the instances of ineffectiveness are listed and discussed below.

a.

In his opening statement to the jury, Schwartz repeatedly referred to "Christian Barnard" as a D&J supervisor. (R2:5, 6, 7, 10) (R2:5 refers to the second volume of the record on appeal, page 5). Christian Barnard is South African cardio-thoracic surgeon famous for having performed the world's first heart transplant. Schwartz should have been referring to Houston Barnhart. Similarly, he referred to the "PJ" Dump which was actually the PZ Dump.

b.

Schwartz could not recall or concentrate on witnesses or facts ("... Jimmy Star, as corporate officer, hired this fellow Nelson to pull ozone -- I'm sorry -- to pull freon ..." R2:7); ("And Nelson goes through -- I'm sorry --- Hudson..." R2:10); ("And Nelson -- Phillips I suggest you will come in here and testify ..." R2:11).

c.

Schwartz allowed to go into evidence a chart without objecting to or seeking the removal of prejudicial written comments placed upon the chart indicating "illegal" acts. (R3:23).

d.

In his cross examination of William Hudson, Schwartz asked: "Was there an encampment right by the lake by itinerant workers, sometimes referred to as the roofers from hell?" (R3:33). The witness asked if Schwartz was referring to the New York housing area. Schwartz incorrectly responded in the affirmative which allowed the witness to respond in the negative. Schwartz should have told the witness that the area near the lake where the encampment was located was near the California housing area. The point was significant because D&J's work was near the California area. The New York area was a mile away. The vandals and itinerants, who were likely suspects, were encamped near the California area.

e.

Schwartz objected to a key answer of Nelson which was favorable to the defense. Upon direct examination by the prosecutor, Nelson testified that "[t]he Army Corps was out there on the job every day. They were driving by probably most every time." (R2:70). The answer was supportive of one of D&J's contentions that illegal venting of freon would have

been detected by the Army Corps. Rather than welcome this evidence and use it in support of his client, Schwartz objected to the testimony as unresponsive. (R2:70).

f.

Nelson's log, Government's Exhibit 6, showed that he reclaimed freon on four days. (R3:71). The log reflected that the first day was December 16, 1994 and the last was January 6, 1995. The prosecutor incorrectly and repeatedly portrayed Nelson as having been on the job each and every day from December 16 through January 6 for a total of roughly 20 days. (R3:72, 75, 78, 79, 88-9). Schwartz failed to object or otherwise establish that the log proved that Nelson was on the job for only 4 days.

g.

Schwartz also failed to dispute Nelson's claim that from January 6 to March 1, he drove past the job site at least twice a week. (R3:78). Nelson had no legal cause to be at the site so often and well after his work had ceased.

h.

Schwartz represented to this court at a sidebar conference that he had two witnesses ready to testify that Nelson offered to share his reward with them if they would change their testimony. (R3:96-8). Schwartz failed to present such testimony.

i.

Nelson testified that he had recovered 740 pounds of freon but when it was weighed, the figure was 712 pounds. (R3:129). Nelson claimed that 10% leakage was allowed. *Id.* Schwartz failed to refute Nelson's testimony with the actual allowable leakage which was far less.

j.

Nelson testified that his first proposal was to be paid $5.075 per pound of freon recovered. (R3:68). But after servicing 30 units, he changed the proposal to $25 per unit. (R3:69). Obviously, the first 30 units must have averaged under 5 pounds each or Nelson would not have so changed the deal. Indeed, recovery from the air conditioning units was "on average, about four pounds per air conditioning unit." Brief for the United States at 10 (citing testimony of Pinna at R3:160).

A total of 284 air conditioning units were serviced (there was a total of 288 but 4 were bulldozed by the Air Force) (R3:74). Nelson recovered 740 pounds from 84 units. Pinna recovered 427 pounds from 104 units. Prior to the trial, Pinna had testified (apparently before the grand jury) that he had recovered 775 pounds of freon. (R3:160). But at the trial, he testified that the 775 figure had been a mistake because he had included the weight of the cylinders. He actually recovered 427 pounds or approximately 4 pounds per unit. (*Id.*). Under Pinna's grand jury testimony of 775 pounds freon, he would have recovered on average more than 7 pounds of freon per unit. That would have been more consistent with Nelson's claim that he recovered 740 pounds from 84 units or an average of approximately 8.8 pounds per unit. But in truth, Pinna had reclaimed only 4 pounds per unit.

The significance of Pinna's change in testimony was lost on Schwartz. Pinna's trial testimony is consistent with the specifications of the air conditioning units themselves which are charged at the factory with 4 pounds 10 ounces of freon (Exhibit I), a fact which Schwartz had failed to investigate or otherwise establish. Nelson was lying when he claimed that the 740 pounds he recovered came from only 84 units. Rather, Nelson must have also reclaimed the freon from the 97 units he claimed were illegally vented. The numbers do not lie: the total freon recovered was 427 (Pinna) + 740 (Nelson) = 1,127 pounds. If all the units contained freon, then at an average of 4 pounds 10 ounces, the 284 units would yield

1,312 pounds. Even the best case scenario for the government, under which 15% of the units could be assumed empty of freon due to Hurricane or other damage, vandalism, leakage, etc., then reducing the 1,312 pounds recovered by that 15% (which would be 197 pounds), that would yield 1,115 as the total number of pounds of freon which would be recovered from the entire site. Since 1,127 pounds were recovered, there was no illegal venting. In other words, if Schwartz had conducted the proper investigation and/or had not been "asleep at the wheel" in the courtroom when Pinna corrected his grand jury testimony, the court and the jury would have understood that all of the freon was accounted for.

Nelson had 980,000 reasons to lie. He sought $10,000 per unit for a total of $980,000 in reward money. He testified that "we could all use some of that." (R3:108). The reward explains why he falsely claimed that the defendants had illegally vented freon.

WHEREFORE, the defendant, D & J Enterprises, respectfully requests an evidentiary hearing and/or a new trial.

I HEREBY CERTIFY that a copy of the foregoing was mailed to Thomas Watts Fitzgerald, Counsel for United States, 99 N.E. 4th Street, Miami, Florida 33132-2111 this _____ day of February, 1999.

Respectfully submitted,

LAW OFFICES OF STEPHEN H. ROSEN, P.A.
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STEPHEN H. ROSEN
Counsel for D & J Enterprises

STATE OF ALABAMA
COUNTY OF LEE

BEFORE ME, the undersigned authority, personally appeared JAMES L. STARR who deposes and states that he has read the foregoing Petition for Writ of Error Coram Nobis and that the facts contained therein are true and correct.

_____
JAMES L. STARR

The foregoing instrument was acknowledged before me this _____ day of February, 1999, by JAMES L. STARR, who is personally known to me or who has produced _____ as identification and who did/did not take an oath.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 95-756-CR-DAVIS

UNITED STATES OF AMERICA,

Plaintiff,

v

D&J Enterprises,

Defendant.

ORDER DENYING MOTION FOR WRIT OF ERROR CORAM NOBIS

THIS CAUSE comes before the Court on defendant's **Motion for Writ of Error Coram Nobis filed on September 27, 2000.** After careful consideration and the Court being otherwise fully advised it is,

ORDERED AND ADJUDGED that the Motion is **DENIED** for the reasons previously stated.

DONE AND ORDERED in chambers at Miami, Florida this 3rd day of October, 2000.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

cc:
AUSA Thomas Watts-Fitzgerald
Stephen H. Rosen, Esq.
Paul Morris, Esq.

[DO NOT PUBLISH]

IN THE UNITED STATE COURT OF APPEALS

FOR THE ELEVENTH JUDICIAL CIRCUIT

No.00-13907

D.C. Docket No. 95-00756-CR-FAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

D&J ENTERPRISES, INC.

Defendant-Appellant,

RAYMOND BUCK PHILLIPS,

Defendant.

No.00-15391

D.C. Docket No. 95-00756-CR-FAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

D&J ENTERPRISES, INC.

Defendant-Appellant,

No.00-15392

D.C. Docket No. 95-00756-CR-FAM

Appeals from United States District Court
for the Southern District of Florida

(April 25, 2002)

Before BARKETT and MARCUS, Circuit Judges, and MILLS*, District Judge.

PER CURIAM:

In light of Mickens v. Taylor, 122 S.Ct. 1237 (2002), the judgment of the district court is affirmed. Appellant D&J Enterprises has not adequately demonstrated that a "conflict of interest adversely affected [defense] counsel's performance" at trial. Id. Because we have resolved this matter on direct appeal, D&J's petition for coram nobis is now moot.

AFFIRMED.

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* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

IN THE UNITED STATE COURT OF APPEALS
FOR THE ELEVENTH JUDICIAL CIRCUIT

July 2, 2002

No.00-13907-AA

D.C. Docket No. 95-00756-CR-FAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

D&J ENTERPRISES, INC.

Defendant-Appellant,

RAYMOND BUCK PHILLIPS,

Defendant.

No.00-15391-AA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

D&J ENTERPRISES, INC.

Defendant-Appellant,

No.00-15392-AA

On Appeal from the United States
District Court for the Southern
District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, _F.2d__).

Before: BARKETT and MARCUS, Circuit Judges, and MILLS*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE
*Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

SUPREME COURT U.S.
FILED
DEC 26 2002
OFFICE OF THE CLERK

No. 02-636

In the Supreme Court of the United States

D&J ENTERPRISES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
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QUESTIONS PRESENTED

1. Whether, in order to establish a conflict of interest in violation of the Sixth Amendment, a defendant must show that the conflict adversely affected counsel's performance, where the government brought the potential conflict to the attention of the district court before trial, and the court declined to inquire into the conflict or to disclose it to the defendant.

2. Whether the courts below erred in rejecting petitioner's conflict-of-interest claim without conducting an evidentiary hearing.

3. Whether the exclusion of petitioner from a pretrial, in-chambers conference at which the district court rejected the government's request for a hearing to inquire into defense counsel's alleged conflict of interest constituted structural error in violation of the Due Process Clause, U.S. Const. Amend. V.

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In the Supreme Court of the United States

No. 02-636

D&J ENTERPRISES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 31-32) is unreported, but the judgment is noted at 136 F.3d 140 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2002. The petition for rehearing was denied on July 2, 2002 (Pet. App. 33-34). On September 10, 2002, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 30, 2002. The petition for a writ of certiorari was filed on October 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the United States District Court for the Southern District of Florida found petitioner guilty of conspiring to release Freon into the atmosphere and to conceal the release from the United States Environmental Protection Agency and the Army Corps of Engineers, in violation of 18 U.S.C. 371; and of releasing Freon into the atmosphere, in violation of the Clear Air Act, 42 U.S.C. 7413(c)(1), 7671g(c)(1), and 40 C.F.R. 82.154(a). Following the jury's determination of guilt, the district court granted petitioner a judgment of acquittal on both counts. The government appealed and the court of appeals reversed, ordering reinstatement of the jury verdicts. *United States* v. *D&J Enters., Inc.*, 136 F.3d 140 (11th Cir. 1998) (Table). Thereafter, petitioner moved for a writ of coram nobis, asserting that its trial counsel had a conflict of interest and had provided ineffective assistance. The district court denied the motion. The court then sentenced petitioner to a fine in the amount of $250,000 and a five-year term of probation. The court of appeals affirmed the judgment of conviction and held that the appeal from the denial of coram nobis was moot. Pet. App. 32.

1. As part of the cleanup operation following Hurricane Andrew, the Army Corps of Engineers retained petitioner D&J Enterprises as a subcontractor to demolish housing units at the Homestead Air Force Base in Florida. The contract required petitioner to use EPA-certified technicians to recapture Freon from the hundreds of air conditioners in the housing units, instead of releasing the freon into the air. Rather than recapturing the freon, petitioner allowed Freon from 94 air conditioners to escape. In two letters to the prime contractor on the cleanup, petitioner attempted to

cover up those environmental and contractual violations. Gov't C.A. Br. 7-8.

2. In a sealed pre-trial motion, the government informed the district court that Fred A. Schwartz, petitioner's trial counsel, was a "subject" of a grand jury investigation in an unrelated matter in the Southern District of Florida. The government requested the court to conduct a hearing for the purpose of advising petitioner of that fact, explaining to petitioner the nature of the potential conflict of interest, and informing petitioner of its right to seek new counsel or to have new counsel appointed upon a proper finding of indigency. Pet. App. 2-8. The sealed motion was served on defense counsel. In a sealed response, defense counsel asserted that a hearing was not required because he was only a "subject" of a grand jury investigation. *Id.* at 9. The district court considered the matter in chambers without the presence of petitioner, and it decided that no hearing was required. Gov't C.A. Br. 25.

3. After the court of appeals ordered reinstatement of the guilty verdicts, petitioner, assisted by new counsel, obtained access to the sealed submission relating to the conflict-of-interest issue. Before being sentenced on the convictions, petitioner filed a petition for a writ of coram nobis, claiming that its original trial counsel labored under a conflict of interest. Pet. App. 12. Petitioner argued that, in light of the district court's failure to conduct a hearing on the conflict after being alerted to the matter by the government, petitioner was entitled to automatic reversal. *Id.* at 18-19. In the alternative, petitioner argued that the conflict adversely affected counsel's performance. In particular, petitioner argued that counsel's legal problems contributed to his inability at trial to "concentrate, recall names or places,

or discern critical issues that would have supported not guilty verdicts." *Id.* at 24.

The district court denied petitioner's motion for a writ of coram nobis. The court concluded that such relief was unavailable because petitioner could raise the conflict-of-interest claim on appeal from petitioner's final judgment of conviction. The court found that the record was sufficiently developed for the court of appeals to resolve the conflict-of-interest claim based on the current record. Gov't C.A. Br. 28-29. Following the issuance of the final judgment of conviction, petitioner filed two appeals—one from the denial of its motion for a writ of coram nobis, and one from the final judgment. The appeals were consolidated in the court of appeals.

4. In a per curiam opinion, the court of appeals summarily affirmed the judgment of conviction. Pet. App. 31-32. The court held (*id.* at 32) that petitioner had failed to demonstrate that any conflict of interest "adversely affected" defense counsel's performance at trial, as required by *Mickens* v. *Taylor*, 122 S. Ct. 1237 (2002). In light of its disposition of the conflict-of-interest claim on direct appeal, the court held that the petition for a writ of coram nobis was moot. Pet. App. 32.

ARGUMENT

1. Petitioner contends (Pet. 5-13) that the court of appeals erred in requiring petitioner to establish that its attorney's alleged conflict of interest adversely affected counsel's performance. In petitioner's view, where, as here, the government brings a possible conflict to the court's attention before trial, and the court fails to conduct an inquiry into the allegation or to disclose the conflict to the defendant, automatic reversal of a conviction is required.

This Court's decision in *Mickens* v. *Taylor*, 122 S. Ct. 1237 (2002), makes clear that petitioner's claim lacks merit. In that case, Mickens was convicted of premeditated murder following the commission of forcible sodomy. After his trial, he learned that one of his attorneys had represented the victim of his crime on a different matter. Based on that discovery, Mickens filed a federal habeas petition alleging that the attorney had a conflict of interest in violation of the Sixth Amendment. In particular, Mickens argued that because the trial court knew or had reason to know about his attorney's conflict of interest and failed to conduct an inquiry into the conflict, automatic reversal of his conviction was required. This Court rejected that claim, holding that where a trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must show, at a minimum, that the conflict adversely affected his counsel's performance. *Id.* at 1243-1245. The Court explained that a rule of automatic reversal would "make[ ] little policy sense" because a "trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable." *Id.* at 1244.

Mickens's reasoning is controlling here. In order to establish a Sixth Amendment violation, petitioner was required to show, at a minimum, that its attorney's alleged conflict of interest adversely affected counsel's performance. The fact that the government alerted the district court to a potential conflict does not support a rule of automatic reversal because that fact "neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable." *Mickens*, 122 S. Ct. at 1244. Because petitioner failed to establish that defense

counsel's asserted conflict of interest adversely affected counsel's performance, the court of appeals correctly rejected petitioner's conflict-of-interest claim.

Holloway v. *Arkansas*, 435 U.S. 475 (1978), on which petitioner relies, does not suggest otherwise. There, *defense counsel* objected to being required to represent three co-defendants in the same matter because the co-defendants allegedly had divergent interests. The trial court denied the motion without inquiry and required defense counsel to represent the co-defendants. This Court held that, where a trial court fails to conduct an inquiry into defense counsel's claim that multiple representation would give rise to a conflict of interest, automatic reversal is required. *Id.* at 487-491. The Court reasoned that a defense counsel is in the best position to ascertain whether he labors under a disabling conflict, *id.* at 485-486, and that joint representation of co-defendants raises distinct concerns, *id.* at 489. *Holloway* therefore creates a narrow exception to the general rule that a defendant asserting a conflict of interest must demonstrate, at a minimum, that the conflict adversely affected his lawyer's performance. As the Court explained in *Mickens*, *Holloway* "creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." 122 S. Ct. 1241-1242. Because defense counsel in this case did not object to representing petitioner, and because defense counsel was not in the position of representing multiple defendants, *Holloway* is inapposite here.

2. Petitioner contends (Pet. 13-14) that its conflict-of-interest claim should not have been denied in the absence of an evidentiary hearing. The district court held that an evidentiary hearing was unnecessary be-

cause the record was sufficiently developed to enable the court of appeals to adjudicate the conflict-of-interest claim on petitioner's direct appeal. The court of appeals agreed with that assessment and rejected petitioner's conflict-of-interest claim on the merits. Petitioner does not identify any basis for disturbing the judgment of two courts below that the record was sufficiently developed to permit a resolution of petitioner's claim without the need for an additional evidentiary hearing.*

Petitioner contends (Pet. 13-14) that the decision below conflicts with *Armienti* v. *United States*, 234 F.3d 820 (2d Cir. 2000). There is, however, no such conflict. In that case, Armienti moved for collateral relief under 28 U.S.C. 2255, alleging that his trial counsel had a conflict of interest because he was under investigation by the same United States Attorney's office that was prosecuting Armienti. The district court denied the motion without an evidentiary hearing. The court of appeals vacated the judgment and remanded for an evidentiary hearing to determine whether there was an actual conflict of interest and, if so, whether the conflict adversely affected the lawyer's performance. 234 F.3d at 825.

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* In *Massaro* v. *United States*, cert. granted, 123 S. Ct. 31 (2002) (No. 01-1559), this Court granted certiorari to resolve the question whether a defendant who did not raise a claim of ineffective assistance of counsel on direct appeal must satisfy the cause and prejudice standard in order to obtain vacation of his conviction under 28 U.S.C. 2255. Although this case confirms (as the government argues in *Massaro*) that some ineffective assistance claims are capable of resolution on direct appeal, the procedural default issue in *Massaro* is not presented here. There is therefore no need to hold the present petition pending the decision in *Massaro*.

Armienti did not hold that an evidentiary hearing is necessary to resolve every conflict-of-interest claim. Rather, it held that such a hearing was necessary *in that case* because the record was not sufficiently developed to permit a resolution of the defendant's claim. The fact that the court of appeals in *Armienti* did not regard the record on appeal in that case as sufficiently developed to enable it to review the conflict-of-interest claim has no bearing on whether the record in this case was sufficiently developed to enable the court of appeals to resolve petitioner's conflict-of-interest claim.

3. Finally, petitioner contends (Pet. 14-15) that its exclusion from the pre-trial conference at which the district court determined that it did not need to conduct an inquiry into defense counsel's potential conflict constituted a structural due process violation. In support of that contention, petitioner relies on the Ninth Circuit's decision in *Campbell* v. *Rice*, 302 F.3d 892 (2002). In that case, the Ninth Circuit rejected the defendant's claim that defense counsel had an unconstitutional conflict of interest because counsel was being investigated by the same United States Attorney's office that was prosecuting the defendant. *Id.* at 896-898. The court reasoned that defendant had failed to show that the alleged conflict adversely affected counsel's performance. *Ibid.* The court went on to hold, however, that the exclusion of the defendant from an in-chambers conference concerning the alleged conflict constituted a structural due process violation requiring automatic reversal. *Id.* at 898-900.

Petitioner did not argue in either the district court or the court of appeals that its exclusion from the pre-trial conference constituted a structural due process violation, and neither one of those courts addressed that issue. Accordingly, that question is not properly pre-

sented here. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Moreover, because the court of appeals had no occasion to address the issue, there is no conflict between the decision below and *Campbell*.

Petitioner's structural error argument is also without merit. A structural defect is one that affects "the framework within which the trial proceeds" and involves "basic protections, [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). Under that standard, any error in excluding petitioner from the pre-trial conference on defense counsel's possible conflict would not constitute structural error. Because counsel's alleged conflict of interest did not adversely affect his performance, the exclusion of petitioner from the pre-trial conference did not compromise the fairness or reliability of petitioner's trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

DECEMBER 2002